TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 666.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, APPELLANT,

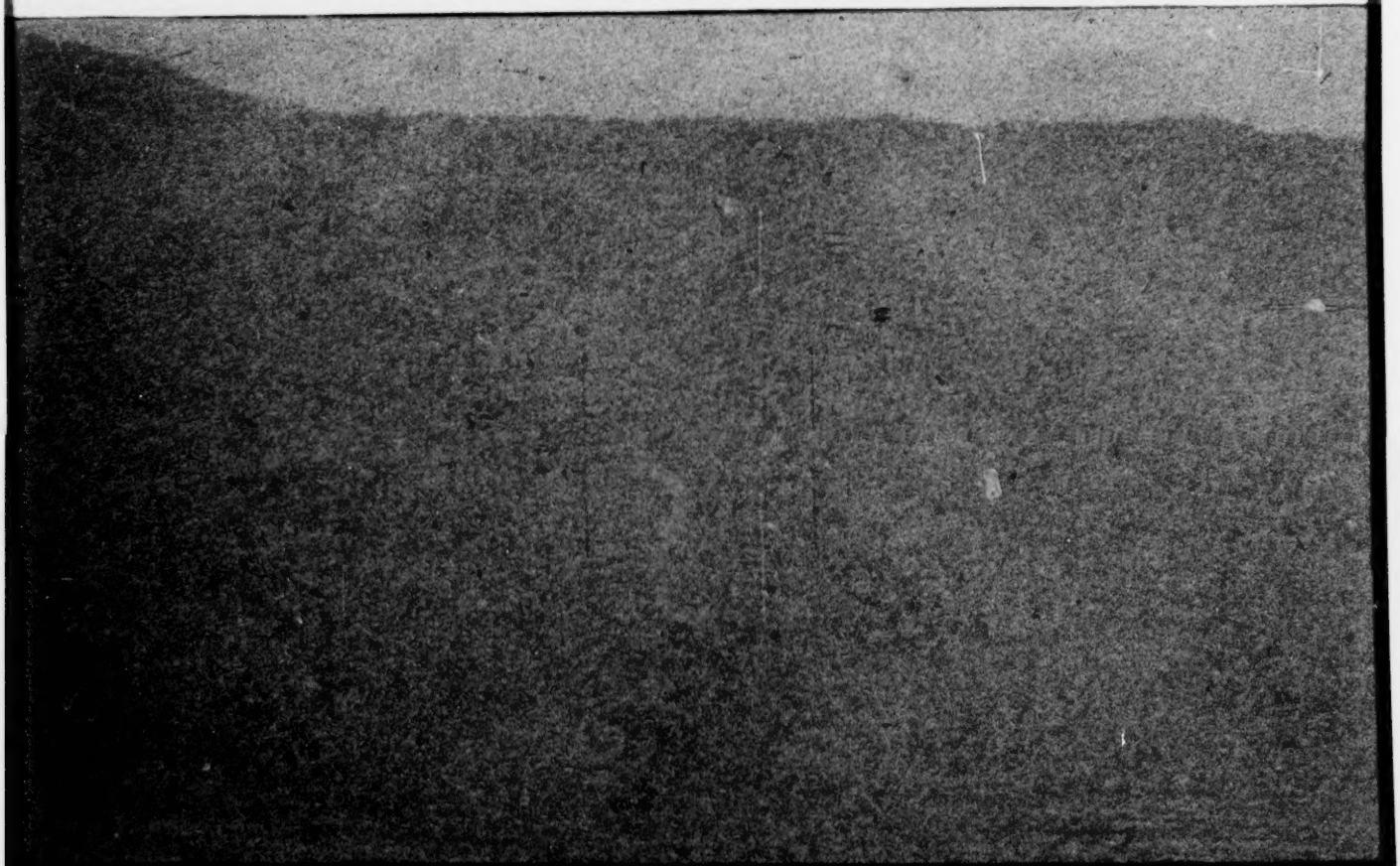
vs.

THOMAS WALSHE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 22, 1904.

(19214.)



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1 Chancery.—United States of America.

To THOMAS WALSHE, *greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., thirty days after the date hereof, pursuant to an appeal which has been allowed by the circuit court of the United States for the district of Indiana, from its final decree in a suit wherein Joseph B. Kealing, United States district attorney for the district of Indiana, on behalf of Henry C. Pettit, United States marshal for the district of Indiana, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Francis E. Baker, judge of the circuit court of the United States for the district of Indiana, this 14th day of December, in the year of our Lord one thousand nine hundred and three.

[SEAL.] FRANCIS E. BAKER, *Judge.*

1½ On this day of , in the year of our Lord one thousand eight hundred and , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I received this writ at Indianapolis Dec. 17, 1903, and served on Henry Spaan, as attorney of record for the within-named Thomas Walshe, by reading to and in his hearing, and at same time and place delivered to him, a true copy of this writ, at Indianapolis, Marion County, Indiana, Dec. 17, 1903.

HENRY C. PETTIT, *U. S. Marshal,*
By ALONZO BUYD, *Deputy.*

2 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday in May, in the year of our Lord one thousand nine hundred and three, before the Honorable Francis E. Baker, judge of said circuit court.

In the matter of the petition of Thomas Walshe. No. 10250, petition for writ of habeas corpus.

Be it remembered that heretofore, to wit, at the May term of said court, on the 8th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the petitioner herein, Thomas Walshe, in person and by his attorneys and files his petition for a writ of habeas corpus directed to Henry C. Pettit, United States marshal for the district of Indiana, commanding him to forthwith produce in court the body of said Thomas Walshe that the cause of his detention by said marshal may be inquired

into, and thereupon the court orders that said writ be issued returnable forthwith and the same is now issued. And said petition and writ are in the words and figures following, to wit:

To Hon. FRANCIS E. BAKER,
Judge of the Circuit Court of the United States
for the District of Indiana:

The petition of Thomas Walshe respectfully shows:

That he is now imprisoned and restrained of his liberty by Henry C. Pettit, marshal of the United States for the district of Indiana, at the Marion County jail, of the city of Indianapolis, in said district.

That your petitioner is thus imprisoned and held in custody
3 under color of the authority of the Constitution and laws of the United States, relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

That said Henry C. Pettit, asserts that he has the right to hold in custody and imprison your petitioner under and by virtue of a certain warrant of arrest issued by one John A. Shields, said to be a United States commissioner appointed by the district court of the United States for the southern district of New York, and also a commissioner to execute the act of Congress entitled, "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," approved August 12, 1848, and the several acts amendatory thereof, of which warrant a true copy is hereto attached marked "Exhibit A."

That said imprisonment is illegal and in violation of the Constitution and laws of the United States for the following reasons:

First. It is asserted by the said marshal that said warrant is authorized by and issued under and pursuant to section 5270 of the Revised Statutes of the United States, being section 1 of the act of August 12th, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," as amended by the act of June 6, 1900. Whereas your petitioner shows and charges that the said warrant being for the arrest and detention of a person alleged to have been convicted of crime, is not authorized by said statute, or any other statute or law of the United States.

Second. That said warrant does not constitute authority by virtue of said statute, or any other law of the United States, for the arrest or detention elsewhere than in the southern district of New York
4 of the person whose arrest and detention is thereby directed; whereas your petitioner was arrested thereunder and is detained in the district of Indiana, of which district he was, and still is, an inhabitant and resident.

Third. That the said warrant does not constitute sufficient authority for the arrest and detention of the person whose arrest and detention is thereby ordered, by any other officer or person than the marshal of the United States for the southern district of New York, or a deputy or other person duly authorized by said marshal.

Whereas your petitioner was not arrested and is not detained thereunder by said marshal, or any deputy or other person authorized by him,

but has been arrested and is detained thereunder by the said marshal of the United States for the district of Indiana.

Fourth. That the said warrant orders that the persons therein directed to be arrested be brought before said John A. Shields, commissioner, at his office, room # 78, in the post-office building in the city of New York, in order that evidence of criminality of said person may be heard and considered, etc. And the said marshal of the United States for the district of Indiana, having arrested your petitioner as the person directed to be arrested thereby, is holding your petitioner under arrest for the purpose of taken him out of the district of Indiana to said southern district of New York.

Whereas your petitioner being an inhabitant and resident of the district of Indiana, and having been arrested therein, is entitled to have the questions of his identity with the person directed to be arrested by said warrant, and of his conviction of crime, as alleged in said warrant, and of his criminality heard and determined in said district of Indiana, before a judge or United States commissioner, or other magistrate, having jurisdiction to hear and determine such matters within said district.

5 Fifth. That your petitioner is not James Lynchehaun, the person directed by said warrant to be arrested and detained.

Sixth. It is not shown by said warrant that the same was issued upon a complaint made by the Government of the Kingdom of Great Britain and Ireland, or by any officer or person authorized in respect thereto by said Government, or that the said James Lynchehaun or your petitioner had in fact committed the crime of which it is alleged he had been convicted.

Seventh. That in and by the said warrant it is shown that the same was issued upon a complaint filed before the said John A. Shields, commissioner, on or prior to the 6th day of June, 1903, on which date the said warrant was issued.

Whereas your petitioner shows that thereafter, on the 24th day of August, 1903, the identical person by whom the said complaint was made before said Commissioner Shields, acting under and pursuant to the same authority, appeared in the district of Indiana before Charles W. Moores, who was then and there a United States commissioner appointed by the district court of the United States for the district of Indiana and authorized to discharge and perform all of the duties required by the provisions of section 5270 of the Revised Statutes of the United States, and to that end to execute the act of Congress entitled "An act for giving effect to certain treaty stipulations between this and foreign kingdoms for the apprehension and delivery of certain offenders," approved August 12, 1848, and of the several acts amendatory thereof, and made complaint, under oath, wherein it was alleged that theretofore and on or about the 15th day of July, in the year 1895, at the general assizes and general goal delivery of the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of his said Britannic Majesty, held at Castlebar, in said

county, before the Right Honorable Mr. Justice Gibson, a justice
6 of said court, one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell with intent thereby, then feloniously

and of his malice aforethought her, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to be kept in penal servitude for his natural life, and was thereafter, under and by virtue of such judgment and sentence of said court, committed to Maryborough convict prison in Queens County, in Ireland; and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough prison and is now at large, and that said sentence of said James Lynchehaun has never been executed; and that the said James Lynchehaun is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America; and that the said crime for which the said James Lynchehaun was so aforesaid convicted and sentenced is named and specified in the treaty between the United States and Great Britain; and thereupon asked that a warrant be issued for the apprehension of said James Lynchehaun, and that he be brought before the said United States commissioner to the end that evidence of his criminality be heard and considered, and that on such hearing such action be taken in the premises as law and justice may require, in order that said James Lynchehaun might be surrendered to the proper authorities of the said Kingdom of Great Britain and Ireland to be further dealt with according to law and in accordance with the treaties and laws in that behalf made.

That thereupon the said United States Commissioner Moores issued his warrant directed to the marshal of the United States for the district of Indiana, and delivered the same to said marshal whereby he was commanded to arrest said James Lynchehaun and bring him before
7 said commissioner to the end that evidence of criminality of the said James Lynchehaun might be heard and considered in order that if sufficient to sustain the charge further proceedings might be had for his surrender to the authorities of the Kingdom of Great Britain and Ireland as an escaped convict.

Your petitioner avers and shows that the said James Lynchehaun referred to in the said complaint made to said United States Commissioner Moores, and in said warrant issued by him thereon, is the same James Lynchehaun referred to in the complaint made to said Commissioner Shields and in the warrant issued thereon by him, and that the crime and conviction thereof and escape from the sentence pronounced thereon set forth in the complaint made to said Commissioner Moores and the warrant issued by him thereon is the same, and not other or different, as the crime, conviction, and escape alleged and set forth in the said complaint made to and warrant issued thereon by said Commissioner Shields.

Wherefore, your petitioner charges that by the institution of the said proceedings before said Commissioner Moores, the said complaint made to said Commissioner Shields and the warrant issued thereon were abandoned and quashed, and the said warrant did not thereafter and does not now constitute any authority for the arrest and detention of your petitioner.

Wherefore, your petitioner prays that a writ of habeas corpus may issue out of the circuit court of the United States for the district of Indiana, to the said Henry C. Pettit, to produce the body of your peti-

tioner before said court, at some convenient time to be therein designated, there to abide what shall be awarded by the court in the premises, and that your petitioner may be discharged from said imprisonment.

THOS. WALSHE.

DISTRICT OF INDIANA,
County of Marion, ss:

8 On this 8th day of September, in the year 1903, before me personally appeared Thomas Walsh, the above-named petitioner, and being by me duly sworn, made oath that the foregoing petition by him subscribed is true in substance and in fact.

NOBLE C. BUTLER,
Clerk U. S. District Court, Dist. of Indiana.

The President of the United States to any marshal of the United States, to the deputies of any such marshal, or any or either of them:

Whereas complaint has been made on oath under the treaty between the United States and Her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12th, 1889, before me, John A. Shields, one of the commissioners appointed by the district court of the United States for the southern district of New York, and also a commissioner appointed to execute the act of Congress entitled "An act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders," approved August 12, 1848, and the several acts amendatory thereof; that heretofore and on or about the 15th day of July, in the year 1895, at the general assizes and general goal delivery for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of His said Britannic Majesty, held at Castlebar in said county, before the Right Honourable Mr. Justice Gibson, a justice of said court, one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell

9 with intent thereby, then feloniously and of his malice aforethought, he, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to be kept in penal servitude for his natural life, and was thereafter under and by virtue of said judgment and sentence of said court committed to the Maryborough convict prison in Queens County in Ireland, and that on or about the 6th day of September, in the year 1892, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough prison and is now at large, and the said sentence of the said James Lynchehaun has never been executed, and that the said James Lynchehaun is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America, and that the said crime for which the said James Lynchehaun was so, as aforesaid, convicted and sentenced is named and specified in the treaty between the United States and Great Britain.

Now, therefore, we command you forthwith to take the said James Lynchehaun and bring him before me, the said commissioner, at my office, room 78, in the P. O. building, in the city of New York, in order that

evidence of the criminality of the said James Lynchehaun may be heard and considered, and if deemed sufficient to sustain the charge, that the same may be certified together with a copy of all the proceedings to the Secretary of State, that a warrant may issue for his surrender pursuant to said treaty.

Witness my hand and official seal this 6 day of June, in the year 1903.

U. S. commissioner for the southern district of New York, and commissioner duly authorized for the district court of the United States for the southern district of New York to act as commissioner under the laws of the United States concerning the extradition of fugitives from justice of a foreign government, under a treaty or convention between this and any foreign government.

10 UNITED STATES OF AMERICA,
District of Indiana, ss:

The President of the United States to Henry C. Pettit, marshal of the United States for the district of Indiana, greeting:

Whereas by petition of Thomas Walshe, duly verified and filed in the office of the clerk of the circuit court of the United States for the district of Indiana, it is alleged that you have in your custody and do unlawfully detain and restrain from his liberty the said Thomas Walshe:

You are commanded that you do produce the body of said Thomas Walshe before the Honorable Francis E. Baker, judge of said circuit court, at Indianapolis, forthwith, with the cause of his detention, there to do, receive, and submit to whatever the said judge shall order in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Indianapolis, this 8th day of September, A. D. 1903.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

And now comes the United States marshal, in person and by Joseph B. Kealing, esq., United States attorney, and produces in court the body of said Thomas Walshe. And this cause is now continued for further hearing until 9 o'clock to-morrow morning.

And afterwards, to wit, at the May term of said court, on the 9th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the marshal of the United States for said district and files his answer herein, in the words following, to wit:

11 To Hon. FRANCIS E. BAKER,
Judge of the Circuit Court of the United States for the District of Indiana.

Henry C. Pettit, United States marshal for the district of Indiana, for answer to the petition of Thomas Walsh, for release from custody of said marshal, says that as said marshal he has arrested and is holding in custody said petitioner, under and by virtue and authority of a certain warrant, a true copy of which, marked "Exhibit A," is filed with and made

a part of said petition; that said warrant in due course came to hand for service as alleged in said petition on the 4th day of September, 1903, and was duly served upon petitioner on the 8th day of September, 1903, at Indianapolis, Indiana; that said warrant is regular, legal, valid, and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York City; that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the southern district of New York, by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; that a true and complete copy of said warrant is attached to petitioner's petition, marked "A," and made a part thereof, and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this honorable court, to obey, as United States marshal for the district of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do.

Defendant further says that this answer is by way of return to the writ issued on petitioner's petition, and said "Exhibit A" is hereby referred to and made a part of this answer and return.

J. J. M. La Follette,
Atty. for Defendant.

12 Henry C. Pettit, being first duly sworn, upon his oath says he is the defendant in and to the foregoing petition, and the writ issued thereon, and that the matters and things stated in the above and foregoing answer and return to said writ and petition, are true, as he verily believes.

Henry C. Pettit.

Subscribed and sworn to before me this 9th day of September, 1903.

Noble C. Butler,
Clerk U. S. Dist. Court.

And afterwards, to wit, at the May term of said court, on the 10th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the petitioner by counsel and files his exceptions to the return of the marshal herein, in the words following, to wit:

Exceptions of the above-named petitioner to the return of the respondent for insufficiency:

First exception. For that the said respondent has not by his said return set forth or shown any matter sufficient in law to justify his imprisonment and detention of your petitioner.

Second exception. For that the matters set forth and shown in the said return do not traverse or confess and avoid the matters set forth in the petition.

THOMAS WALSHE,
By H. N. SPAAN,
A. W. WISHARD,
A. C. HARRIS,
F. WINTER,
His Attorneys.

And said exceptions having been argued by counsel are now submitted to the court.

13 And afterwards, to wit, at the May term of said court, on the 11th day of September, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

The exceptions to the return of the marshal upon the writ herein having been argued by counsel and submitted for the consideration of the court, and the court being duly advised in the premises, said exceptions are now sustained, and the marshal declining to amend his return or plead further it is ordered by the court that the prayer of the petition be, and the same is hereby, granted, and it is further ordered by the court that the petitioner be discharged from custody.

OPINION OF THE COURT.

BAKER, circuit judge (orally):

On the petition of Thomas Walshe, a writ of habeas corpus was issued in this case, and the return of the marshal justifies the detention of the *of the* petitioner by virtue of a writ issued by United States Commissioner Shields in the southern district of New York, addressed to any marshal of the United States, and commanding him to arrest and bring before the commissioner for hearing one James Lynchehaun as a person who had been convicted in Ireland of the offense of assault with intent to kill, and who had escaped with the sentence unexecuted.

The exceptions of the petitioner challenge the legality of this writ, which was the only justification set up in the return.

Passing over those objections that go to the formality of the writ, and the questions presented as to the scope that this hearing on habeas corpus might take, I come to the one question that seems to me controlling,

14 and that is, the power of the commissioner in the southern district of New York to issue a warrant upon which the marshal of this district may lawfully arrest the accused and return him to the court of the commissioner in New York. The solution of that question depends upon the terms of the existing treaties between this country and Great Britain and the statute of the United States enacted to carry the provisions of such treaties into effect. If a construction of the statute and treaties had been given by the Supreme Court of the United States to the effect that a commissioner of one district can cause the arrest of an accused person at any place he may be found within the sovereignty of the United States and brought to New York, I would be constrained to follow such an interpretation. No decision of the Supreme

Court to that effect has been cited, and my own examination of the authorities has failed to disclose one. Certain decisions in courts of the United States have been referred to. In the Henrich case, in 5 Blatchf. 414, 11 Fed. Cas., p. 1143, arising under the treaty of June 16, 1852, with Prussia, the language of Article I thereof being identical with Article X of the treaty of 1842 with Great Britain, it was expressly decided that a warrant issued and returnable in New York was legally served in the State of Wisconsin, and that the return of the accused person from Wisconsin to New York for the purpose of the extradition hearing was warranted by the treaty and statutes.

In the case of re Fergus, 30 Fed. Rep., 607, the Henrich case is referred to, but the question was not in any way involved in the case, and it does not appear that the court in that instance made an independent examination of the treaties and statutes for the purpose of forming and announcing a judgment of his own. The citation of the Henrich case in the Fergus case is simply a passing allusion.

The case of In re Berauch, 41 Fed., 472, is also referred to, but
15 in that case the question was not raised and decided, nor was the matter contained in the dictum in the view of the decision of the Henrich case. The Berauch case simply shows that the prisoner was brought forcibly from New Jersey to New York, and was discharged in New York because the showing against him was not sufficient. The case exhibits circumstances under which the question now presented might have been raised, but it was not.

In Grin v. Shine, 187 U. S., 181, the Henrich case is referred to on page 187. The observation is made that the Henrich case was vigorously contested because the warrant was executed without the limits of the district of New York and within the State of Wisconsin. There is no expression of opinion on the question whether the execution of the warrant in Wisconsin was lawful.

So that, as a matter of authority, the only case that has been presented or that I can find in which the question now presented is decided is the Henrich case. It is my duty to give to the decisions of the Federal courts in other circuits the weight and consideration to which they are entitled in view of the ability and learning of the judges who decided them, but they are not binding in this circuit as authorities and precedents, and finally are entitled to only such consideration as the reasoning of the case justifies. In the Henrich case I do not find any consideration given to some features of the treaty and statute that are controlling with me at this hearing, and, therefore, as a matter of authority and precedent I find myself compelled to be actuated solely by my own judgment as to the scope of the treaties and statute.

In Article X of the treaty of 1842 it was provided that the United States and the King of Great Britain, upon mutual requisitions, should deliver up to justice all persons who, being charged with certain specified crimes, should seek an asylum or should be found within the
16 territories of the other, provided that this shall be done only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. The petitioner in this case is charged with being an escaped convict. So far as the issues to be tried before the examining

magistrate that may arise upon the sufficiency of the record of conviction to be presented by the demanding Government are concerned, and so far as the determination of the issue made by the petitioner's denial that he is the person who was convicted is concerned, it is very clear to me that those issues would be controlled by Article X of the treaty of 1842 in connection with section 5270 of the statutes relating to extradition.

In the recent case of Wright v. Henker, 23 S. C. Rep., 581, it is very clearly determined that the representatives of the two Governments in making the treaties of 1842 and 1889 had respect to the dual form of the Government of the United States; of course, the treaty making power is with the national end of our duality, but it was competent for the National Government to make the test of the existence of extraditable crimes, and to make the test of the definition of the crime depend upon the State law; and in the treaty, as the words of the treaty themselves clearly indicate, the test of the right of the British Government to demand the return of an accused person was made to rest upon the law of the place where he was found—that place being determinable by the lines of the States, districts, and Territories that make up the United States, and I have no doubt that such is the situation with respect to the provinces and colonies of Great Britain, because the contracting parties referred to an accused person "who shall seek an asylum, or who shall be found within the territories of the other," and that the return could only
17 be had upon evidence sufficient, according to the laws of the place where the person shall be found, to justify his commitment if the offense had been committed there. And in section 5270, R. S., enacted to carry the provisions of extradition treaties into effect, the magistrates referred to may, upon complaint made under oath charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of the foreign government an extraditable crime, issued his warrant, etc. So that it is absolutely clear to my mind that the one nation was not dealing with the other merely as national entities. It was in that capacity only that they could execute the treaty, but each had regard to the situation of the other, and, on the part of the British Government, the dual character of our institutions is very clearly recognized. We have no common law crimes in this country. The penal code enacted by Congress is very limited. The great bulk of the crimes that are defined by the statutes are found in the penal codes of the States alone; and so if an accused person is found in Indiana and his return to Great Britain is demanded, the right of extradition stands upon whether or not the offence with which he is charged is an offence under the laws of Indiana. That is the substance of it, for it is made a condition upon which the return may be had, that the evidence of criminality shall be determined according to the law of the place where the person is found, and such as justify his commitment for trial if the crime or offense had there been committed. Article X of treaty of 1842.

If an offence is committed in Indiana of course it is contemplated by the law of Indiana that the preliminary hearing and the commitment for trial shall be in Indiana. Neither of the treaties nor the statute say in so many words that the hearing shall be had in the place where the accused party is found, but, inasmuch as the law of the place where he is found, not only with respect to the substantial definition of the
18 crime, but also with respect to the competency of witnesses and

the admissibility of evidence are made controlling, it was also intended that the hearing should be had at the place where he was found, particularly in view of the reference to the fact that the return is only justified under these circumstances that would warrant his commitment if the offence was committed in the jurisdiction where he was found. Of course, if an offense is committed there, his preliminary hearing must be had in that jurisdiction.

Now, returning to the Henrich case, I observe that the court thought it sufficient ground upon which to decide that the warrant was one that run throughout the United States to observe the fact that the extradition is arranged for by treaty between the two countries in their national capacity. Of course that is necessarily so. The treaty-making power is lodged in the national part of our institutions. But because the United States as a national entity alone has authority to make the treaty, it does not follow that the basis of returning people who are demanded under an extradition treaty is to be the national law, or under the national definition of crime. No attention was paid in the Henrich case to the fact, which has been thoroughly established by the courts, that the operative basis of extradition treaties is the law of the place where the accused person is found.

Now, while it is true that the court in New York may decide the question according to the law of Indiana, and, therefore, the decision of Wright v. Henkel is not conclusive upon the question now before the court, yet inasmuch as it would be necessary to have a person committed in Indiana for an offense in Indiana, before a magistrate of Indiana, I shall hold, until controlled by explicit legislation, or until the Supreme Court shall, by definite construction, declare that the makers of the treaty intended that an accused person, presumably innocent,
19 could be taken from Alaska to New York for the purpose of a preliminary hearing, or that an American citizen, presumably innocent, could be taken from Australia to London for the purpose of a hearing, that no such intention was within the view of the makers of this treaty and that they intended that when the basis of the extraditability of the crime was made the law of the place where he was found, that the hearing would be had there, similarly to the hearing where he would be committed for trial if the offense had been committed in the place where he was found.

So I will sustain the exceptions of the petitioner to the return of the marshal, and, as counsel for the British Government have indicated that they do not desire to amend, the petitioner may be discharged.

And afterwards, to wit, at the November term of said court, on the 20th day of November, 1903, before the Honorable Francis E. Baker, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Joseph B. Kealing, esq., United States attorney, and files a petition for appeal and assignment of errors in the above-entitled cause in the words following, to wit:

Comes now Joseph B. Kealing, United States district attorney for the district of Indiana, and on behalf of the United States prays the court that the respondent, Henry C. Pettit, United States marshal for the

district of Indiana, be granted an appeal and writ of error from the decision and judgment of the court in the foregoing-entitled cause to the Supreme Court of the United States, and for all proper relief therein.

JOSEPH B. KEALING,
U. S. Attorney.

ASSIGNMENT OF ERRORS.

Comes now Henry C. Pettit, United States marshal and respondent in the above-entitled cause, and files his petition herein for an appeal
20 and writ of error to the Supreme Court of the United States, and assigns the following errors in said cause, to wit:

First. The court erred in sustaining the exceptions and each of them taken and filed to the return of the said respondent, Henry C. Pettit, to said writ of habeas corpus.

Second. The court erred in holding and deciding that a warrant for arrest in an extradition proceeding does not run and may not be served beyond the territorial limits of the district in which it is issued.

Third. That the judgment of the court that a warrant for arrest issued by a United States commissioner in the State of New York addressed to any United States marshal in any district of the United States was not sufficient authority to authorize the respondent, Henry C. Pettit, to arrest and hold the said Thomas Walshe, whose true name was James Lynchehaun, and in ordering the discharge and release of the said prisoner and in rendering judgment therefor in said cause was erroneous.

For which errors and each of them the said respondent prays that said judgment of the court be in all things reversed, and that judgment be entered for the respondent and for costs.

JOSEPH B. KEALING,
U. S. Attorney.

And thereupon it is ordered by the court that said appeal and writ of error be, and the same are hereby, granted.

21 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in said court in the matter of the petition of Thomas Walshe for a writ of habeas corpus, filed and entered in said court, as fully as the same appears of record in my office.

Witness my hand and the seal of said court at Indianapolis, in said district, this 16th day of December, A. D. 1903.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

(Indorsement on cover:) File No. 19214. Indiana C. C., U. S. Term No., 563. Henry C. Pettit, United States marshal for the district of Indiana, appellant, vs. Thomas Walshe. Filed January 23rd, 1904. File No. 19214. Office of the clerk Supreme Court U. S. Received Dec. 19, 1903. Office of the clerk Supreme Court U. S. Received Jan. 23, 1904.

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